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Supreme Court, U.S.
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Docket Number: 971848 MAY 18 1998

Supreme Court of the United States

October 1997 Term

DAN RODNEY JOOS,
Petitioner,

vs.

PIPER C. JOOS,
Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE UTAH COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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46 pp

Questions presented for review

By adding "**irreconcilable differences**" to divorce statutes, the states have created a no-fault divorce trend repugnant to the Constitution of the United States. As a matter of first impression are spouses provided adequate notice of what conduct is forbidden? Is it drawn so imprecisely that it encourages arbitrary and discriminatory enforcement of the law? Is it so broad that it sanctions conduct which states are not entitled to regulate or ensnares couples whose marriages can be preserved? Does it extend the state's police power beyond their compelling interest, deny procedural due process and threaten fundamental and express constitutional rights?

ALL PARTIES

Dan Rodney Joos	Petitioner
Piper C. Joos	Respondent
Anthony Dan Joos	Son to this marriage
Aaron Kent Joos	Son to this marriage
Alexander Brent Joos	Son to this marriage

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JURISDICTION

On September 25, 1997 the Utah Court of Appeals issued a Memorandum Decision; the court denied a Petition for Rehearing October 17, 1997. The Utah Supreme Court denied a Petition for Writ of Certiorari on February 23, 1998. 28 USCS § 1257 confers jurisdiction on the Supreme Court of the United States.

The Attorney General of the State of Utah shall be served with this document (28 U.S.C. § 2403(b) applies).[Rule 29.4 (c)]

CONSTITUTIONAL PROVISIONS UNITED STATES CONSTITUTION

AMENDMENT I

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

AMENDMENT IV

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

AMENDMENT XIV Section 1.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES: UTAH CODE

30-3-1. Procedure - Residence - Grounds.

"(1) Proceedings in divorce are commenced and conducted as provided by law for proceedings in civil causes, except as provided in this chapter."

30-3-1(3)(h).

"irreconcilable differences of the marriage."

30-3-4(1). Pleadings - Findings - Decree.

"(b) A decree of divorce may not be granted upon default or otherwise except upon legal evidence taken in the cause. If the decree is to be entered upon the default of the respondent, evidence to support the decree may be submitted upon the affidavit of the petitioner with the approval of the court.

(c) If the petitioner and the respondent have a child or children, a decree of divorce may not be granted until both parties have attended the mandatory course described in Section 30-3-11.3, and have presented a certificate of course completion to the court. The court may waive this requirement, on its own motion or on the motion of one of the parties; if it determines course attendance and completion are not necessary, appropriate, feasible, or in the best interest of the parties."

30-3-5. Disposition of property.

"(1) When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, debts or obligations, and parties."

30-3-11.1. Family Court Act - Purpose.

"It is the public policy for the State of Utah to strengthen the family life foundation of our society and reduce the social and economic costs to the state resulting from broken homes and to take reasonable measures to preserve marriages, particularly where minor children are involved. The purposes of this act are to protect the rights of children and to promote the public welfare by preserving and protecting family life and the institution of matrimony by providing the courts with further assistance for

family counseling, the reconciliation of spouses and the amicable settlement of domestic and family controversies."

30-3-12. Courts to exercise family counseling powers.

"Each district court of the respective judicial districts, while sitting in matters of divorce, annulment, separate maintenance, child custody, alimony and support in connection therewith, child custody in habeas corpus proceedings, and adoptions, shall exercise the family counseling powers conferred by this act."

30-3-16.1. Jurisdiction of family court division - Powers.

"Whenever any controversy exists between spouses which may, unless a reconciliation is achieved, result in the dissolution or annulment of the marriage or in the disruption of the household, and there is a child of the spouses or either of them under the age of 17 years whose welfare might be affected, the family court division of the district court shall have jurisdiction over the controversy, over the parties and over all persons having any relation to the controversy and may compel attendance before the court or a domestic relations counselor of the parties or other persons related to the controversy. The court may make orders in divorce or conciliation proceeding as it deems necessary for the protection of the family interests."

30-3-16.2. Petition for Conciliation.

"Prior to the filing of any action for divorce, annulment, or separate maintenance, either spouse or both spouses may file a petition for conciliation in the family court division invoking the jurisdiction of

the court for the purpose of preserving the marriage by effecting a reconciliation between the parties or an amicable settlement of the controversy between them so as to avoid litigation over the issues involved."

30-3-17. Power and jurisdiction of judge.

"The judge of a district court may counsel either spouse of both and may in his discretion require one or both of them to appear before him and, in those counties where a domestic relations counselor has been appointed pursuant to this act, require them to file a petition for conciliation and to appear before such counselor, or may recommend the aid of a physician, psychiatrist, psychologist, social service worker or other specialists or scientific expert, or the pastor, bishop or presiding officer of any religious denomination to which the parties may belong. The power and jurisdiction granted by this act shall be in addition to that presently exercised by the district courts and shall not be in limitation thereof."

STATEMENT OF THE CASE

This is the companion petition to another petition to the United States Supreme Court (Docket Number 97-1677, docketed April 15, 1998).

The Utah Supreme Court addressed one of the federal questions, but denied certiorari to the Utah Court of Appeals on the question of constitutionality, the subject of this petition.

When it became apparent that the district court was going to proceed contrary to Utah law, a great deal of study and research was launched to understand the purpose and application of no-fault divorce. A wealth of information was given to the court before trial (R.159-225) [Record pages 159 through 225].

This information explains in detail to the judge the causes and preventions of divorce and how they apply to our family. It shows that the court had repeatedly misinterpreted the meaning and application of no-fault divorce (R.165,166), and that the legislature says that it's purpose is to prevent "blow-ups" in court caused by the introduction of fault "grounds" (R.165). It says the judge had broken the Code of Judicial Conduct and ceased to be a fair tribunal by giving her decision in the case before trial and before the court had received any evidence(R.166). [See Utah Code 30-3-4(1)(b), page 3]

This authority given to the court discusses the constitutionality of no-fault divorce as it applies to the many states. I told the Judge (R.166):

> "55 ALR 3d 581 is probably the best source to show how a "no-fault divorce" can be appealed from numerous, diverse legal aspects if not shown to be a marriage that had irreparably broken down."

The following was provided to the judge (citations omitted):

> (R.173) "55 ALR 3d 581 **Validity**, Construction, and effect of "no-fault" divorce statute..."
>
> (R.175) "The validity of marriage dissolution statutes of this nature has been attacked in several instances on such grounds as improper delegation of the legislative power, **denial of due process of law**, impairment of the obligation of contract and **unconstitutional vagueness of statutory language**, but no dissolution of marriage act of the type here under consideration has been held invalid as of this writing.".
>
> (R.179-180) "§ 3. Validity of Statute. Statutes providing for a dissolution of marriage based upon a finding that the relationship is no longer viable are a relatively recent development in the law,

the first such statute having been enacted into law in California, and having become effective in 1970. Despite the relative novelty of such statutes, however, there have already been **attacks on their validity on such grounds as vagueness of statutory language**, impairment of the obligations of contract, **denial of due process of law**, and improper delegation of legislative power."

(R.180) "A contention that a statute providing for dissolution of marriage upon a finding of **irreconcilable differences** which have caused the irremediable breakdown of the marriage **was unconstitutional, in that it laid down absolutely no guidelines as to what constituted irreconcilable differences**, with the result that the marriage might be dissolved "on the whim and caprice of the particular judge..."

"A statute providing for dissolution of marriage upon a finding of **irreconcilable differences** which have caused the irremediable breakdown of the marriage was held valid over objections that it **violated the constitutional guaranty of due process, that it was too vague and ambiguous to assure uniform application**..."

(R.181) "...statutory ground of **"irreconcilable differences."** Considering the contention on its merits nonetheless, the court pointed out that **a statute will not be held void for vagueness** if any reasonable and practical construction can be given to its language, or **if its terms may be made reasonably certain by reference to other definable sources**. The court found no unreasonable uncertainty or ambiguity in the statutory language, **observing that the express legislative intention was to require the consideration of the marriage as a whole and to make the possibility of reconciliation an important issue**, and also to provide a basis for

> dissolution which is **descriptive of the actual reasons** underlying the marital breakdown."

Many more pages of authority continues, showing that some states have statutes that define and give direction for use of no-fault divorce. Utah law has none of these protections for consistent application or interpretation of the law which had already caused the judge to fail in sufficiency of compliance with counseling and conciliation procedures critical for determining if irreconcilable differences exist.

The trial judge doesn't care what it means or how the legislature wants it to be used and said that she was going to accept all testimony of fault (in this **no-fault** divorce trial) (R.298), but allowed us "a continuing objection" on this clear misuse of the law.

On appeal, the Utah Court of Appeals said, incredibly, that constitutionality "was not raised before the trial court. Thus, the issue was not preserved for appeal." (A-4) [Appendix, Page 4] What do all these foregoing quotes from the record discuss? – Isn't "constitutionality" clearly and repeatedly in the record? The trial court simply chooses to ignore that issue along with all the other issues raised about the correct use and interpretation of no-fault divorce. The Utah Court of Appeals is seeking to sidestep the issue in the same manner that it evades all the issues raised on appeal. All these issues are submitted and timely raised, the trial court chooses to disregard them.

Page 16 of the reply brief to the Utah Court of Appeals says (citations omitted):

> "The effort was made, in vain, many times at trial to have the judge consider this authority (R.288,490,492,500). [Opposing] counsel quotes this ALR authority (R.175). He says of irreconcilable differences (C.13):"

"... and **unconstitutional vagueness of statutory language**, but no dissolution of marriage act of the type here under consideration has been held invalid as of this writing."

"Counsel says, (C.13) "statutes providing for dissolution of marriage on grounds of irreconcilable differences, have been held to be valid". And repeats the same sentence almost verbatim on page 15 of his brief."

"The **question here is not whether any no-fault' statute is constitutional, the question is; is Utah Code 30-3-1(3)(h) "irreconcilable differences of the marriage" unconstitutional?**"

(P.17) "If there is one fundamental principle which is calculated to perpetuate our form of government, both federal and state, more than any other, it is that **every citizen, regardless of his station or condition, is entitled to the equal protection of the law whether it applies to his personal or to his property rights. Every law which offends against that principle in the Federal Constitution is necessarily invalid.**"

(P.18) "Herein on page 16 is counsel's quote which includes the words "**unconstitutional vagueness of the statutory language**."

"The Utah Supreme Court explains vagueness:"

"'**Vagueness' goes to the issue of procedural due process,** i.e., whether the statute is **sufficiently explicit and clear** to inform the ordinary reader of common intelligence what conduct is prohibited." (Emphasis added)."

"Piper and I got married in 1978 when "fault grounds" told us what behavior, in clear language, could end our marriage. In 1987 the legislature added a no-fault ground with no explanation as to its meaning or use. (It was like putting a baby elephant

into a henhouse with no special accommodation for its different nature)."

"Now what did the statute tell me to do to prevent divorce? It was not **explicit and clear** to me or to anyone else in the court room. The trial judge repeatedly advocated that it means that anyone who asks for a divorce and doesn't want to work on the marriage can have one (R.166,504,505). This means that marriage is not a vow or or lifetime commitment, but merely the same thing as what used to be its polar opposite. To the trial judge, marriage is "shacking up." However, those who just "live together" can split up and make every decision to divide and pay everything without going to the courthouse. **This is denial of equal protection which will be discussed later."**

(P.19) "Irreconcilable differences" was argued in another extreme by [opposing] counsel. At trial, counsel maintained that this statute was just another **fault ground** which allowed any and all faults to be presented. No longer was evidence or testimony limited to a specific area; anything was allowed now. Counsel said (R.297):"

"Utah is still a fault state and irreconcilable differences is one of the grounds set forth in the statute as the basis for divorce, and **that is fault**. (Emphasis added)"

"The Utah Supreme Court gives a three-step test for vagueness that this statute fails entirely. The court then says: "However, whichever way it was meant, **uncertainties exist which would make the statute void.** (Emphasis added)"

"Having studied the issue in depth, my argument of its meaning differed greatly from the trial court and counsel and revolved around the oft-mentioned 55 ALR 3d 581."

"Furthermore, **this legal authority that I provided to support this claim also speaks about**

being "overbroad" (R.181) on the pages that I named (P.29) for the benefit of this court. Because the trial judge based the ruling and divorce decree on (R.504): 'He preaches to her' and 'she's disagreed' and 'the parties have disagreed,' then **this statute is also fatally overbroad for it forbids us our fundamental right to freedom of speech.** (Constitution of Utah, Article I, Section I; **United States Constitution, Amendment I**) The dictionary says of "preach": to urge acceptance or abandonment of an idea or course of action, to advocate earnestly; and says to 'disagree' means to differ in opinion. **It makes no sense to dissolve a marriage simply because someone exercised their constitutional right to communicate their opinions.** To refuse a spouse this **right of freedom of speech** would mean having to "agree" to everything and anything one's mate says or does. That sounds like slavery, not marriage."

(P.20) "The Utah Supreme Court **quotes the United States Supreme Court** as follows:"

"A clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct."

"It is **plain error** for the trial judge to decree divorce based on "preaching" and "disagreeing" for those fall under our **fundamental right of freedom of speech**. Also the judgment must fail because it was **plain error** for the trial judge to deprive me of virtually all our property and my relationships with my children."

"The Utah Supreme Court explains the three requirements to obtain appellate relief from **error even if it were not "properly objected to."** These are similar to those enumerated by the **United States Supreme Court** in May of this year (*Johnson v. U.S.* 117S.Ct. 1544,1546, [1997])."

(P.21) "Moreover, *J.I. Case Credit Corp. v. Foos* 717 P.2d 1064, 1066 (Kan. App. 1986) provides unlimited appellate review on conclusions of law on **unraised issues** when **plain error** is evident or **fundamental rights are at issue**. (See also *Falk v. Keene Corp.* 782 P.2d 974,982 [Wash.1989])."

"Instead of following the law and preserving our family as desired by the legislature, the trial judge was very anxious to use power and authority in all other areas in our lives. In the process, the judge awarded to me the use of less than 2% of our entire estate, awarded my wife alimony although she had no house payment, gave me nearly all the marital debt to pay and restrained the children from going with me or staying with me. **This is obvious and plain error that impedes my constitutional right to our property and to be with our children. "Irreconcilable differences" evaporated my most cherished rights when I joined a small class of citizens who dared to seek to oppose the dissolution of marriage** (R.180). **It permitted procedures that allowed the government to intrude into areas with no reason to be there."** (Emphasis added)

The issue of constitutionality and proper application of no-fault divorce was clearly raised to the trial court and is plainly in the record. The briefing on appeal shows the Utah Court of Appeals was distinctly told that even if it had no been "properly objected to" that **plain error** was amply served for it to be considered on appeal.

Additionally the reply brief told the Utah Court of Appeals (P.23):

"It is **plain error** for the judge to say **before trial** that my wife can have a divorce if she wants it (R.166). **"Irreconcilable difference" caused the trial judge to deny a fair trial and to improperly receive evidence of fault. The United States**

Supreme Court says (*Bracy v. Gramley* 117 S.Ct. 1793,1797, [1997]):

"But the **floor established by the Due Process Clause clearly requires a 'fair trial in a fair tribunal,...' before a judge with no actual bias against the defendant** or interest in the outcome of his particular case." (Emphasis added)

"The validity of the statute is further eroded by the **United States Supreme Court** in *Gilbert v. Homar* 117. S.Ct. 1807,1812 (1997) when it explains a part of **due process includes 'the risk of erroneous deprivation of such [private] interest through the procedures used.'"**

(P.24) "Finally, 16A AmJur 2d § 771 explains **the United States Supreme Court ruling** (*Eisenstadt v. Baird*)of a state statute:

"Providing dissimilar treatment for married and unmarried persons who are similarly situated, the statute violates the equal protection clause of the Fourteenth Amendment."

"Utah Code 30-3-1(3)(h) is unconstitutional as vague and overbroad which confusion was the cause of a judgment that denied due process, equal protection and allowed government intrusion into fundamental rights. It is the root cause of much plain error that should nullify the judgment and decree. The law cannot burden us and deprive us rights that all other people enjoy." (Emphasis added)

The extensive authorities and arguments on constitutionality are disregarded and the Utah Court of Appeals pays no attention to abundant "plain error" saying (A-4):

"This issue was not raised before the trial court. Thus, the issue was not preserved for appeal."

Why does the Utah Court of Appeals refuse to address the issue of "plain error" if it believes "the issue was not raised?" Pages 9-10 of the Petition for Rehearing says:

> **"Constitutionality was before the trial court** and also shows that because I was defending myself against **an unconstitutional law**, the trial court **stripped me of my fundamental rights and committed much plain error**. The memorandum decision does not address the **plain error** issues raised and is erroneous."
>
> "It seems to me a real possible result of the State taking away my rights and refusing to do anything to try to preserve our marriage will lead to a strict scrutiny review of why we even came to court. When everyone else is able to end contracts and relationships in very similar situations without such burdens, the **Constitution protects us from such unfair, unequal treatment.**"
>
> "Very recently the **United States Supreme Court** said in a unanimous decision (*Washington v. Glucksburg* 117 S.Ct. 2258 [1997] 2267 [citations omitted])":
>
> "**Due Process Clause 'protects individual liberty against certain government actions regardless** of the fairness of the procedures used to implement them.'"
>
> "**The clause** also provides heightened protection against government interference with certain **fundamental rights** and liberty interests."
>
> "In a long line of cases, we have held that in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specifically protected by the **Due Process Clause** includes the **rights to marry**, to have children, to direct the education and upbringing of one's children, **to marital privacy...**"
> "**The Fourteenth Amendment** "forbids the government to infringe...'**fundamental' liberty** interest **at all**, no matter what process is provided,

unless the infringement is narrowly tailored to serve a compelling state interest. (Their emphasis)."

"There is no denying that the judgment strips me of virtually all property and parental interests. The legislature wisely said the district judge **may** make **equitable** orders for these two rights. Anything **more would have been unconstitutional and it is plain error** for the judge to have ordered so unfairly simply because I am seeking to save my marriage with my beloved." (Emphasis added).

ARGUMENT

It would be unthinkable for a doctor to execute every patient seeking his help; unimaginable for doctors to refuse to diagnose, prescribing, instead, identical remedies for the mildly sick to the hopelessly injured.

This, however, is a good comparison to what many states have crafted with the advent of no-fault divorce. States compound the problem by refusing to let citizens see any other "physician".

The very nature of this type of case consistently evades review of the United States Supreme Court because litigation damages the relationship of struggling marriages beyond repair. (A caretaker who ends the life of a patient is immune from suit if the law says only the patient can sue!) A marriage and relationship is not static; separation and years of litigation to arrive beyond the state courts drives a lethal wedge into marriages. For this reason, it is of extreme importance for the United States Supreme Court to hear our case to stand up for the constitutional rights of people in our class and against the laws that destroy the most important relationship in society.

In no other area do states universally infringe so many constitutionally protected fundamental rights of such a large segment of society as in no-fault divorce proceedings. The United States Supreme Court has not reviewed no-fault divorce, thereby denying the necessary strictest scrutiny to protect our multitude of rights to marry, to direct the education and upbringing of our children, to marital

privacy, equal protection of the laws, property rights, etc. (See page 14). No other case is more important to society and the welfare of our nation.

The following relies on two authorities given to the trial court and the Utah Court of Appeals: 55 ALR 3d 581 (R.173-209) [Record pages 173-209] and Utah Law Review, Vol. 1970, April, pp. 191-220 (R.210-225) (All citations omitted).

Vagueness is pure poison to the administration of justice. Vagueness consistently ensnares innocent bystanders that the state legislators never imagine the laws would touch. Already some states are ending marriages when the parties have not asked for it. One wife asks only for a legal separation (R.202). The appellate court says the "finding that marriage was not irretrievably broken was clearly erroneous" and orders the wife to accept, instead, a decree of divorce. Another state dissolves a marriage (R.200) at the request of a third party using "no-fault divorce" even though neither party wishes a divorce and even objects and gives evidence supporting their marriage. The states are intruding heavily into the most sacred of relationships and the sanctity of coveted constitutional rights with the most vague of all statutes: no-fault divorce.

States and courts claim "The particular terminology used in the statute...must of necessity be somewhat imprecise (R.176)", that to be "imprecise...is both deliberate and desirable (R.185)," that the "term 'irreconcilable marital difference' necessarily lacks precision and should not be circumscribed by strict definition (R.187)." By using vague no-fault divorce statutes, states are taking from couples their constitutional "right to marry" (*Washington v. Glucksburg* 117 S.Ct. 2258 [1997] 2267) and making the couple's decision to be married the province of the courts. As said on page 194 of the record:

> "Under the dissolution of the marriage statute, the court emphasized, the decision of whether the evidence adduced supports findings that irreconcilable differences do exist and that the marriage has broken down irremediably and **should**

be dissolved is left to the trial court, not to the parties." (Emphasis added)

The real trouble with the above logic is that the heart of a vagueness challenge has always been whether the average man and woman on the street understands what the law expects of them, not whether judges and lawyers are happy with it.

For example, if a spouse doesn't always give in to the demands of a selfish spouse, is that "irreconcilable differences" for which the state can end the marriage? If in-laws insist that you discipline your children their way and you disagree, will the state force you to divorce? If challenges arrive that cause stress and change in the marriage like losing your job, a death of a child, retirement, cancer, depression or disappointment, need we fear the states will label it "irreconcilable differences" and determine your marriage must end?

The shift of rights and power from the people to the courts has been gradual, but real. In an almost imperceptible way, no-fault divorce has abandoned the compelling interest of the states in marriage. The deep public interest in strong marriage and lasting relationships has been forsaken by state judges who now use the power of their office to control and decide who stays together and how the couple must manage or end their relationship. The couple no longer has freedom of choice about their children, money, or property which is basic to happiness and available to all other members of society.

Put another way, years ago a complaint for divorce in the many states was a petition of one or both spouses for permission to end their marriage. The couple was seeking consent of the state, which a judge granted if any "grounds for divorce specified by statute" (R.175) were shown to exist. In this age of vague no-fault "irreconcilable differences" many judges now assume their role is to regulate the break-up, not to preserve the marriage. Like the district courts in Utah repeatedly say before trial: "Anyone can have a divorce who wants it." (R.165,166) If that statement is true and Utah has abandoned the compelling interest the state has in marriage, then

married couples have the right to end their relationship without going to the courts, just like all other citizens in the state are permitted to end all types of relationships.

But Utah doesn't say they wish to abandon their interest in marriage. In 1987, the only evil the legislature said they were attempting to correct when they added "irreconcilable differences" to create "no-fault"grounds for divorce, was to cease the accusation and fault-finding in court. Falsely assuming all the judges in the state intuitively know their aim and having failed to memorialize this intention in statute, the legislature also fails to define "irreconcilable differences" or give directions to ensure consistent application of the law.

Statutes which affect fundamental interests require more precision in drafting and must be narrowly drawn to express only the state's compelling objective. It cannot be susceptible of reaching constitutionally protective activity.

"Irreconcilable differences" fails in every way to be valid. Everyone guesses at its meaning (See page 10 for three completely different theories at our trial). It fails to give "adequate notice" to what is prohibited. It ends marriages that could be saved. It is too ambiguous to be uniformly administered. (Our trial judge forbids us to be together or to reconcile [R.73], and declares a slew of statutes and public policy invalid [R.153, R.128] as her interpretation of the meaning of "irreconcilable differences"). It is overbroad. (We are told the judge is ending our marriage because we have "disagreed" [First Amendment]. In other words we can't be married if we don't agree to spend money and raise our children the way relatives and neighbors tell us to.)

Some states say (R.176) "The possibility of reconciliation being an important issue" and couples are "precluded from obtaining dissolution by...failure to comply with statutory conciliation procedure." In our case we are refused the benefit of Utah Code 30-3-11.1, 12, 16.1-16.7 and 17. (See pages 3-5)

Some states say collusion is held to be available, others say it is not (R.176,194). Some cases say evidence "need not be corroborated", but others say "corroboration has been held necessary" (R.176). (R.188) "Divorce could not be based on irreconcilable differences where there was no property settlement agreement" as compared to our case where the court makes no allowance for us to make a "property settlement agreement." (Utah Code 30-3-5(1) [see page 3] doesn't give the court the power to usurp our property rights) (See Fourth Amendment, page 2).

Most states seem to say "evidence as to fault was inadmissable" (R.176) and "proceedings should be nonadversary" (R.185) (Our case the judge **expanded** accepting fault as evidence contrary to the express intent of the legislature [R.297,165]).

> (R.177) "Another evidentiary problem which may arise is that of the admissibility of evidence of "fault" for the marital breakdown. Where this issue is not explicitly resolved by the terms of the statute itself, the question may arise of whether evidence of "fault" is properly admissible in an action intended to be nonfault-oriented."
>
> "Statutes of this nature...may in fact render it more difficult to show that grounds for divorce exist."
>
> "Broad statutory language as to grounds for dissolution of marriage and the occasional lack of clear definitions in statutes of this nature may give rise to evidentiary problems in the course of determining how to prove that the particular marriage is longer viable and is within the appropriate statutory terminology."
>
> (R.175) "Thus, such statutes shift the focus of inquiry of the court from the acts and characteristics of the parties to the state of the marriage relationship itself."

Pages 185-191 of the record continues with endless no-fault states and cases showing hodgepodge rulings of narrow to broad

interpretations and applications. It is the couples who suffer from this mishmash of rulings and vague statutes.

The real losers are the children and their families who have fallen on hard times or are affected by outside circumstances where it is still possible to preserve their relationship and marriage, but are lumped together and treated the same as hopeless marriages that have real grounds for divorce. "Irreconcilable differences" provides an open invitation to trample on individual rights through trendy redefinitions or judicial abuse.

The United States Supreme Court says in *Gilbert v. Homar* 117 S.Ct. 1807,1812 (1997) (citations omitted):

> "To determine what process is constitutionally due, we have generally balanced three distinct factors:
>
> 'First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest.'"

When "irreconcilable differences" causes judges to forsake marriage and to reach long arms into our property, parental and privacy rights, they become "subject to the restraints imposed by the Fourth Amendment." *New Jersey v. T.L.O.* 105 S.Ct. 733, 740 (1985). The United States Supreme Court says therein (citations omitted):

> "[t]he basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals, against arbitrary invasions by government officials."

Piper and I did not break any laws, but are treated by the state courts as if we are criminals. If "government has a heightened obligation to safeguard students whom it compels to attend school," (*New Jersey v. T.L.O.* page 750) then it certainly has the same

heightened obligation when it compels married couples and children to court.

In *M.L.B. v. S.L.J.* 117 S.Ct. 555, 564-565 (1996) the U.S. Supreme Court says (citations omitted):

> "Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society,' rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect...the close consideration the Court has long required when a family association so undeniably important is at stake."
>
> "It was also the Court's unanimous view that '[f]ew consequences of judicial action are so grave as the severance of natural family ties.'"

"Irreconcilable differences" violates these rights by violating the essential element of due process of law - fair warning.

It is utterly preposterous for state courts to interpret "irreconcilable differences" - as in our case - that the people who tell my wife "to get a divorce" (R.421), "criticizing her" (R.423), "would not support Piper in the valiant efforts and goals that we set and accomplished" (R.162); whose "efforts to destroy our home" (R.168), "interfered"... "to break-up our family" (R.171), who "are controlling her" (R.459), are paying her to get a divorce (R.344), and who "wanted Piper to marry another person" (R.162) have more standing in the law's eyes to end our marriage than the responding spouse has to preserve the marriage.

On page three of this petition , Utah Code 30-3-4(1) (b) says that "A decree of divorce may not be granted...except upon legal evidence." Long before trial and without any evidence, the trial judge said Piper could "have a divorce if she wanted it." (R.166) The vagueness of "irreconcilable differences" causes this plain "lack of an impartial trial judge" (*Johnson v. U.S.* 117 S.Ct. 1544, 1550

[1997]). The United States Supreme Court says this is a "structural error" (Page 1549), an error the Utah Court of Appeals refuses to address (see page 12-13). The Court of Appeals fails to address another "structural error" of fault-finding at trial contrary to expressed legislative intent when they passed the no-fault law (R.165). When vagueness in "irreconcilable differences" causes a judge to accept testimony of fault contrary to the law and the judge allows "a continuing objection" (R.298) to that error, then certainly "vagueness of irreconcilable differences" is a "subsidiary question fairly included therein" (Rule 49(a)(4), Utah Rules of Appellate Procedure). In other words, because the judgment can be challenged and overturned on the "structural error" and "continuing objection" of receiving testimony and decreeing divorce based on "fault", it can be challenged on the vagueness of law that **causes** the error and the "continuing objection."

The vague and overbroad "irreconcilable differences" also caused "plain error" (*Johnson v. U.S.*, page 1549) by violating the First Amendment to the United States Constitution (see page 11 of this petition). The Utah Court of Appeals dodges this error also. Utah's divorce law begins with a command to the courts to follow exceptions to "proceedings in civil cases"... "as provided in this chapter" (see Page 2, Utah Code 30-3-1[1]). Due process of the Federal Constitution is denied when the state courts refuse to honor these laws.

(R.210) Bridgitte M. Bodenheimer (Research Professor of Law, University of California, Davis; former Associate Professor of Law, University of Utah College of Law,) warns on page 224 of the record:

> "5. *Grounds for dissolution of marriage.* It is clear from the psychiatric evidence that the wish of one of the partners - and frequently the wish of both - to end the marriage does not necessarily mean that the marriage relationship is in fact completely disrupted. The expressed desire for divorce may be a communication to the other spouse that something is seriously wrong or a communication to others that there is a crisis requiring outside help, and may thus

> be a turning point rather than the end in the continuing dynamics of the marital relationship. It follows that the desire for divorce alone cannot serve as a ground for divorce."
>
> "It is generally agreed today that the old fault grounds have outlived their usefulness. There is also growing consensus that divorce should be granted when the marriage has completely broken down. When translating this very general idea into a criterion usable by a judge, however, care should be taken to avoid a complete swing of the pendulum from yesterday's marriage breakdown without recourse to divorce, to today's divorce without breakdown."

The erroneous interpretation of "irreconcilable differences" causes the trial judge to completely disregard the sanctity and importance of our marriage vows thereby sweeping our marriage into divorce. Purposely impairing and preventing reconciliation, the judge sees "the desire for divorce alone" and wholly disregards the "crisis requiring outside help" and the "turning point" in the "marital relationship." Clearing the precious court docket is more important than my wife's needs, than the needs of our children, and even more important than upholding the law and public policy. The trial judge even snubs all input of the guardian-ad-litem (R.95).

> (R.213) "When such a combination of stressful factors has created a marital crisis 'the first solution considered is divorce or hospitalization, both characterized by separation, avoidance, and scapegoating. In such a crisis, it is unusual for either spouse to have made such a firm commitment to divorce that he will not consider alternatives.'"
>
> "Usually the team can suggest small changes in familiar patterns of behavior in the form of family and individual tasks. These suggestions are usually accepted and divorce is not seriously considered further."

> "At this point crisis therapy is ordinarily terminated. If dissatisfaction with the marriage persists, further negotiation of the conflict may be necessary, and finally, separation rather than conciliation may have to be considered by each spouse. When alternatives to separation are presented, however, few marriages stand in danger of dissolution."

For some reason "irreconcilable differences" allows state courts to forbid this therapy, even when it is mandated by law, and to actually destroy relationships in crisis. This is why the United States Supreme Court should step in and stand up for marriage. Both district and appellate state courts claim grounds exist for divorce, but neither court dares say how they, or anyone determines grounds with this vague law. The district court repeatedly says at trial that the finding for grounds for divorce is simply my wife's "testimony to the court under oath" that "the differences are irreconcilable. And I find that testimony to be sufficient for me to grant the divorce." (R.505) The judge **found nothing**! It would sound pretty silly for a judge to tell a defendant that he owed a plaintiff one million dollars because the plaintiff testified "under oath" that the million dollars was due him. If that is all the findings it takes, there would suddenly be a lot of plaintiffs testifying "under oath" that someone owes them a million dollars.

> (R.213) "Judge Paul W. Alexander of Toledo, Ohio, after presiding over many divorce cases in the traditional manner became saddened and disturbed by the spectacle of human misery parading before him daily in the "sham battle" of adversary proceedings with but one adversary. He began to ask questions from the bench and found that people with all kinds of troubles were seeking help. They had filed for divorce, but divorce was not what many of them really wanted. Instead, the judge realized, they were in need of advice and guidance but were rarely aware of the various kinds of help available outside the divorce court."

"Couples who seemed most adamant about demanding divorce were often the ones who most ardently hoped for another way out. "Perhaps the trauma of domestic disharmony so disturbs the emotions of the spouses," the judge said, "that their judgment becomes unsettled and they are unable to think and decide rationally." The similarities between these observations and those of Doctors Langsley and Kaplan are striking."

"It became clear to the judge that all he was accomplishing was "the burial of a dead marriage," but, he was morally certain that in far too many cases he was being called upon to "bury a live corpse."

"The Judge would hear these common complaints of divorce litigants: 'I don't want no divorce, I was just tryin' to bring him to his senses"; all I wanted was him to quit drinkin' and come home'; 'I just filed for divorce because I didn't know what else to do'; 'divorce won't do me no good, I want him to bring his paycheck home'; 'If you'd only make her quit that factory job we'd get along swell'; 'Judge, will you help me get back my refrigerator?'"

(R.214) "However, Judge Alexander's main ideas still live on. Today divorce courts in such states as Wisconsin, California, Michigan, Ohio and Utah operate on the philosophy that the judiciary has a role to play not only in dissolving marriages but also in preserving them."

"The second judicial pioneer to become a "family therapist" was Los Angeles Judge Louis H. Burke, now a Justice of the Supreme Court in California. Judge Burke hung up his robe one day, stepped down from the bench, and spent more than a year listening to the human problems of divorce litigants. Like Judge Alexander and the psychiatrists already described, Judge Burke discovered that many persons who bring divorce actions would much

> prefer to restore their marriages if they could find a way to do so."

"Irreconcilable differences" should no longer be allowed to deny couples and children the opportunity of reconciliation and their constitutional right to stay together. The United States Supreme Court is the only hope of so many millions of families to remain in love and united, unimpaired by state courts and laws that would do otherwise.

Vagueness of "irreconcilable differences" allows state courts to arbitrarily and discriminatorily decide who should be married and does not give couples any notice of what conduct is forbidden. (When state laws say adultery is a ground for divorce, both courts and couples know exactly what behavior is expected.) Vagueness allows state courts to destroy family relationships that otherwise can be preserved.

For the foregoing reasons, this petition for writ of certiorari should be granted. Dated the 15th day of May, 1998

Respectfully submitted,

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